No. 77-1850

In the Supreme Court of the United States

OCTOBER TERM, 1978

CORRINE GRACE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

PHILIP B. HEYMANN,
Assistant Attorney General,

WILLIAM G. OTIS,
JOHN C. WINKFIELD,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1978. A petition for rehearing was filed on May 9, 1978, and is still pending.[1] The petition for a writ of certiorari was filed on May 26, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]The Court may wish to defer action on the petition until petitioner has advised it of the action taken on her petition for rehearing.

QUESTIONS PRESENTED

1. Whether the trial court's instruction on intent was correct.

2. Whether the evidence of the principal's intent was sufficient to support petitioner's conviction as an aider and abettor.

STATEMENT

Following a jury trial in the United States District Court for the District of Arizona, petitioner was convicted of aiding and abetting the misapplication of funds by a bank employee, in violation of 18 U.S.C. 656 and 2. She was sentenced to a term of imprisonment for one year and a day and fined $5,000. The court of appeals affirmed (Pet. App. A).

The evidence at trial showed that petitioner encouraged and abetted Kenneth Miller, the manager of a branch of the Arizona Bank of Phoenix, Arizona, in concealing numerous overdrafts in her account.[2] Petitioner began to overdraw the account in the summer of 1974 and continued until September 1975, by which time the overdrafts totalled almost $1,000,000. At one time, early in the scheme, petitioner helped Miller cover up an accumulated $50,000 overdraft by depositing the required funds (Tr. 165-166, 174). Later, petitioner asked Miller to get approval for loans of $200,000 and $600,000. To facilitate the approval, Miller presented petitioner's request to his superiors without informing them that he was continuing to permit petitioner to overdraw her account (Tr. 170). When bank officials discovered petitioner's overdrafts, they classified the deficit as a loan and negotiated a repayment schedule. However, at the time of trial in April 1977, petitioner remained in arrears in her repayment efforts (Tr. 131).

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[2] Miller was indicted as a principal. He pleaded guilty and testified for the government.

Petitioner admitted at trial that she had overdrawn her account by nearly $1,000,000 in a single three-month period in 1975 (Tr. 368). She did not dispute that she cooperated with Miller in the cover-up. Instead, her defense was that Miller did not commit a crime under Section 656 and therefore that there was no crime she could have abetted. Specifically, her position was that Miller did not intend to defraud the bank but only sought to keep her as a client, and that he believed she would eventually cover the deficit in her account. Since Miller did not intend ultimately to defraud the bank, petitioner argued that he did not have the intent required for conviction under Section 656.

ARGUMENT

1. Petitioner contends (Pet. 2, 7-9) that the trial court's instruction on intent was erroneous. Petitioner's claim is without substance.

Petitioner takes issue with the following charge (Tr. 569):

> Now, an intent to injure or defraud, as contemplated by the statute, is not inconsistent with a desire for the ultimate success and welfare of the bank. A wrongful misapplication of the funds, even if made in the hope or belief that the bank's welfare would ultimately be promoted, is nonetheless a violation of the statute, if the necessary effect is or may be to injure or defraud the bank.
>
> The ultimate or future possibility or probability of benefit to the bank, that's not a defense to aiding and abetting a misapplication of bank money and funds.

Petitioner's specific complaint is that this constituted a "*Mann*" instruction and was thus error. The *Mann* instruction, named for *Mann* v. *United States*, 319 F. 2d 404, 407 (C.A. 5), certiorari denied, 375 U.S. 986, states the proposition that the jury may infer that "a person

ordinarily intends the natural and probable consequences of [his] acts."[3] Petitioner correctly notes that use of this instruction has been disapproved by several courts of appeals,[4] including the court below (see *Bloch* v. *United States*, 221 F. 2d 786 (C.A. 9)). The principal defect that these courts have discerned in the *Mann* charge is that it can be construed as shifting to the defendant the burden of proving innocent intent. See, *e.g.*, *United States* v. *Netterville*, 553 F. 2d 903, 917 (C.A. 5), certiorari denied, 434 U.S. 1009.

The charge challenged here was addressed to petitioner's theory that no crime had been committed because Miller intended ultimately to help rather than to injure the bank. The instruction thus correctly explained a well-established principle of criminal law: that a benign motive is not inconsistent with an intent to engage in unlawful conduct. *United States* v. *Pomponio*, 429 U.S. 10. The courts of appeals, including some that have disapproved the *Mann* instruction, are in agreement with the court below that the intent requirement of Section 656 is met when a bank employee knowingly misapplies funds in a way that is likely to result in injury to the bank, even if the employee's motive is benign. See *United States* v. *Beran*, 546 F. 2d 1316,

[3]The entire instruction is as follows:

> It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.

[4]See, in addition to the cases cited at Pet. 8, *United States* v. *Robinson*, 545 F. 2d 301 (C.A. 2); *United States* v. *Guy*, 456 F. 2d 1157 (C.A. 8), certiorari denied, 409 U.S. 896; *McCarty* v. *United States*, 409 F. 2d 793 (C.A. 10), certiorari denied, 396 U.S. 836.

1321 (C.A. 8), certiorari denied, 430 U.S. 916; *Johnson* v. *United States*, 95 F. 2d 813, 816 (C.A. 4); *Galbreath* v. *United States*, 257 Fed. 648, 656 (C.A. 6); *United States* v. *Tokoph*, 514 F. 2d 597, 603-604 (C.A. 10). The instruction in this case simply stated that principle. Unlike the *Mann* instruction, the instruction given in this case did not invite the jury to infer intent "unless the contrary appears from the evidence" or to base its finding of intent on its determination that "one standing in like circumstances and possessing like knowledge should reasonably have expected" the forbidden event to have occurred.

Viewed in the context of the charge as a whole, *Cupp* v. *Naughten*, 414 U.S. 141, 146-147, the language complained of could not conceivably have prejudiced petitioner, even if the instruction was erroneous. The court instructed that in order to convict petitioner, the jury was required first to find beyond a reasonable doubt that Miller had violated Section 656, and that in so doing he had acted "with intent to injure or defraud the bank" (Tr. 564-565). It then charged that an intent to defraud means an intent to deceive or cheat "for the purpose of either causing some financial loss to another, or bringing about some financial gain to oneself or to another" (Tr. 566); that the government had to prove both the act and specific intent beyond a reasonable doubt (Tr. 567); and that "misapplication of funds" as used in the statute meant taking or converting the bank's funds "wilfully, with the specific intent to injure or defraud the bank" (Tr. 567-568). There is thus no realistic possibility that the court's instructions as a whole could have been construed as shifting to petitioner the burden of proof on intent or on any other element of the offense.

2. Petitioner states (Pet. 2) but does not argue that the evidence was insufficient to prove Miller's criminal intent. The court of appeals found the proof sufficient (Pet. App. 11-12), and the record amply supports its conclusion.

The government's evidence established that Miller purposefully manipulated check processing procedures in order to hide petitioner's $928,000 overdraft. Miller admitted that he had acted improperly in permitting petitioner continually to overdraw her checking account by substantial amounts (Tr. 188). Miller also admitted that he purposely concealed petitioner's substantial overdrafts either by depositing in her account out-of-state checks that she admitted were no good or by resubmitting checks that were not backed by sufficient funds (Tr. 169-172, 183-188). He further admitted that he had intentionally applied to petitioner's overdraft loan monies that petitioner had received from another bank in order to pay off an outstanding Arizona Bank loan (Tr. 179). Miller knew that the result of this conduct would be to leave petitioner's Arizona Bank loans unsecured (Tr. 180). Miller thus in effect extended to petitioner an interest-free, unsecured loan of almost $1,000,000. At minimum, as Miller well knew, the bank lost "the freedom to invest and loan its funds at its own discretion" (Pet. App. 11). Thus there was more than sufficient proof of Miller's intent to misapply bank funds.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

PHILIP B. HEYMANN,
Assistant Attorney General.

WILLIAM G. OTIS,
JOHN C. WINKFIELD,
Attorneys.

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